TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 230.

JOHN OLUF JOHANNESSEN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED MARCH 11, 1910.

(22,062)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1912.

1 In the District Court of the United States, Northern District of California.

No. 13848.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNESEN, Respondent.

Præcipe for Apostles.

To James P. Brown, Clerk:

Please prepare and certify to the Supreme Court of the United States the following papers, constituting the record on file in the above entitled matter, to wit:

1. Petition to cancel certificate of naturalization.
2. Appearance, answer and consent to judgment.
3. Stipulation and order setting aside answer and consent to judgment and allowing respondent time to plead.
4. Demurrer to petition to cancel certificate of naturalization.
5. Amended petition to cancel certificate of naturalization.
6. Stipulation allowing demurrer to petition to stand as demurrer to amended petition.
7. Opinion overruling demurrer to amended petition.
8. Decree of cancellation of certificate.
9. Petition for appeal and order allowing appeal.
10. Assignment of errors.

2 11. Bond on appeal.
12. Citation.

Dated: January 14th, 1910.

ROBT T. DEVLIN,
United States District Attorney,
Attorney for Petitioner.
PAGE, McCUTCHEN & KNIGHT,
Attorneys for Respondent.

(Endorsed:) Filed Jan. 14, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

3 In the District Court of the United States, Northern District of California.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLUF JOHANNESSEN, Respondent.

Petition (to Cancel Certificate).

The Petition of the United States of America, respectfully shows:

I.

That Robert T. Devlin is now, and for more than two years last past has been the duly appointed, qualified, and acting United States Attorney in and for the Northern District of California.

II.

That on the 6th day of October 1892, in a proceeding had and taken in the Superior Court of Jefferson County, State of Washington, under and by virtue of Section 2165, of the Revised Statutes of the United States of America, entitled "In the matter of the Application of John Olaf Johannesen, An Alien, to become a citizen of the United States of America," an order and Certificate of Citizenship was in due form made and entered in the said Superior Court, admitting John Oluf Johannessen to become a citizen of the United States of America, which order and Certificate of Citizenship was in words and figures as follows, to-wit:

4 "In the Superior Court of Jefferson County, State of Washington, United States of America.

Present: Hon. Morris B. Sachs, Judge.

In Open Court, this 6th Day of October, 1892.

In the Matter of the Application of JOHN OLAF JOHANNESEN, an Alien, to Become a Citizen of the United States of America.

It appearing to the satisfaction of this Court, by the oaths of Oliver Johnsen and Ida B. Johnsen, citizens of the United States of America, witnesses for that purpose, first duly sworn and examined, that John Oluf Johannesen, a native of Norway, has resided within the limits and under the jurisdiction of the United States five years at least, last past, and within the State of Washington, for one year at least, last past; and that during all of said time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and it also appearing to the Court, by competent evidence, that the said applicant has heretofore, and more

than two years since, and in due form of law, declared his intention to become a citizen of the United States, and now having here, before this Court, taken an oath that he will support the Constitution of the United States of America, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly to Oscar II, King of Norway & Sweden,

5 It is therefore ordered, adjudged and decreed, by the Court that the said John Olaf Johannessen be, and is hereby admitted and declared a citizen of the United States of America.

STATE OF WASHINGTON,
County of Jefferson, ss:

I, W. F. Fenimore, County Clerk of Jefferson County, State of Washington, United States of America, and ex-officio Clerk of the Superior Court of said County, said Court being a Court of Record, having a common law jurisdiction and a Clerk and Seal, do certify that the foregoing is a true copy of the Act of Naturalization of John Olaf Johannessen as the same appears on the Records of said Court, now in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Port Townsend, this 6th day of October, in the year of our Lord one thousand eight hundred and ninety-two and in the year of our Independence the one hundred and seventeenth.

(SEAL.) W. F. FENIMORE, *Clerk,*
By J. D. FORD, *Deputy.*"

6 III.

That thereafter a Certified copy of said Order was issued out of said Superior Court and delivered to said John Oluf Johannessen.

IV.

That the said Johannessen was born in Norway, and arrived in the United States for the first time in the month of December, 1888, and was never a resident of the United States prior thereto.

V.

That the said John Oluf Johannessen now resides within the Northern District of the State of California.

VI

That prior to the institution of this proceeding an affidavit showing good cause therefor was made by the said John Oluf Johannessen and delivered to the United States Attorney, in and for the said Northern District of California, a copy of which affidavit is hereto attached, marked Exhibit "A," and made a part hereof.

Wherefore your Petitioner prays that this Honorable Court, after

such notice to the raid John Oluf Johannessen as by law required, set aside, cancel, and hold for naught said Order and Certificate of citizenship and take such other and further action in the premises as is meet in law or equity. And your Petitioner will ever pray.

ROBERT T. DEVLIN,
CARLOS G. WHITE,
Attorneys for said Petitioner in and for the Northern District of California.

7 EXHIBIT "A."

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John Oluf Johannessen, first being duly sworn, deposes and says: I am the John Oluf Johannessen, who was naturalized in the Superior Court of Jefferson County, State of Washington, before Judge Morris B. Sachs, on the 6th day of October, 1892.

I was born in Sandefiord, Norway, on October 11, 1869. My father was a Native of Sweden. I arrived in the United States for the first time in the month of December, 1888.

I freely and voluntarily admit that I was illegally naturalized in 1892, as aforesaid, in that I had not been living in the United States for five years at that time, and in that I had only known my two witnesses, and my two witnesses had only known me, at that time, about two years and a half; and I freely and voluntarily make this affidavit for the purpose of having proceedings instituted under Section 15 of the Naturalization Act of June 29, 1906, to set aside and cancel, the Certificate of Citizenship issued to me, as aforesaid, on October 6, 1892, and I consent that this affidavit may be used against me in said proceedings and for all purposes.

My present place of residence is San Francisco, California.

JOHN OLAF JOHANNESSEN.

Subscribed and sworn to before me this 29th day of June, A. D. 1908.

[SEAL.] E. H. HEACOCK,
U. S. Commissioner for the Northern District of California, at San Francisco.

8 (Endorsed:) Aug. 21, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

9 In the District Court of the United States, Northern District of California.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLUF JOHANNESSEN, Respondent.

Appearance, Answer, and Consent to Judgment.

Comes now, John Oluf Johannessen, the Respondent, above named, in propria persona, and hereby voluntarily makes his ap-

pearance and answer in the above entitled proceeding as follows, to-wit:

I.

The said Respondent hereby waives the issuance of process and hereby waives the notice required by Section 15 of the Act of June 29, 1906, and voluntarily submits himself to the jurisdiction of the above entitled Court.

II.

That said Respondent admits to be true each and every allegation and matter of fact set forth in the Petition of the United States of America, on file in the above entitled proceeding.

III.

The said Respondent admits that the Certificate of Citizenship set forth in the Petition on file in the above entitled proceeding was illegally procured in that the said Respondent had not been a resident of the United States five years at the time of his admission to Citizenship, and the Respondent hereby consents that Judgment may be entered against him forthwith cancelling the said order and Certificate of Citizenship.

JOHN OLAF JOHANNESEN.
The said Respondent.

(Endorsed:) Filed Aug. 21, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, Northern District of California.

No. 13848.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNSEN, Respondent.

Stipulation as to Withdrawal of Answer and Consent to Judgment, etc.

Stipulation.

It is hereby stipulated and agreed by and between the parties herein that the answer and consent to Judgment heretofore interposed and filed, to-wit, on the 21st day of August, 1908, in the above entitled matter, be withdrawn, and that the Defendant may have the time allowed by law in which to make answer, within which to demur, plead, answer, or make such motion as he may be advised.

ROBERT T. DEVLIN,
CARLOS G. WHITE,
Attorneys for Petitioner.
JOHN OLAF JOHANNESEN,
The Respondent.

Upon reading the above stipulation and good cause appearing therefor, it is so ordered.

JOHN J. DE HAVEN.

September 1, 1908.

(Endorsed:) Filed Sept. 1, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

12 In the District Court of the United States, Northern District of California.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNESEN, Respondent.

Demurrer (to Petition).

This Respondent, by protestation, not confessing or acknowledging all or any of the matters and things in the said Petitioner's Petition to be true, in such manner and form, as the same are therein set forth and alleged doth demur thereto, and for cause of Demurrer, showeth:

That it appears by the Petitioner's own showing by the said Petition that it is not entitled to the relief prayed by said Petition against this Respondent.

Wherefore, and for divers other good causes of demurrer appearing in said Petition, this Respondent Demurs thereto, and he prays a Judgment of this Honorable Court whether he shall be compelled to make further or any Answer to the said Bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

PAGE, McCUTCHEN & KNIGHT,
Attorneys for Respondent.

13 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John Olaf Johannessen, makes solemn oath and says that he is the Respondent and that the foregoing Demurrer is not interposed for delay.

JOHN OLAF JOHANNSEN.

Subscribed and sworn to before me this 28th day of October, 1908.

[SEAL.] HENRY P. TRICOU,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of Law.

SAMUEL KNIGHT,
Of Counsel for Respondent.

Service of the within Demurrer and receipt of a copy is hereby admitted this 29th day of October, 1908.

ROBERT T. DEVLIN,
CARLOS G. WHITE,
Attorney- for Petitioner.

(Endorsed:) Filed Oct. 29, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

14 In the District Court of the United States, Northern District of California.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLUF JOHANNESSEN, Respondent.

Amended Petition.

The Petition of the United States — America, respectfully shows:

I.

That Robert T. Devlin, is now, and for more than two years last past has been the duly appointed, qualified, and acting United States Attorney in and for the Northern District of California.

II.

That on the 6th day of October, 1892, in a proceeding had and taken in the Superior Court of Jefferson County, State of Washington, under and by virtue of Section 2165, of the Revised Statutes of the United States of America, an order and Certificate of Citizenship was in due form made and entered in the said Superior Court admitting said Respondent, John Oluf Johannessen, to become a citizen of the United States of America, which Order and Certificate of Citizenship was in words and figures as follows, to-wit:

"In the Superior Court of Jefferson County, State of Washington, United States of America.

Present: Hon. Morris B. Sachs, Judge.

In the Matter of the Application of John Olaf Johannesen, an Alien, to Become a Citizen of the United States of America.

15 In Open Court this 6th Day of October, 1892.

It appearing to the satisfaction of this Court, by the oaths of Oliver Johnsen, and Ida B. Johnsen, citizens of the United States of America, witnesses for that purpose, first duly sworn and examined,

that John Oluf Johannesen, a native of Norway, has resided in the limits and under the jurisdiction of the United States, five years at least, last past, and within the State of Washington, for one year at least, last past; and that during all of said time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and it also appearing to the Court, by competent evidence, that the said applicant has heretofore, and more than two years since, and in due form of law, declared his intention to become a citizen of the United States, and now having here, before this Court, taken an oath that he will support the Constitution of the United States of America, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly to Oscar II, King of Norway & Sweden.

It is therefore ordered, adjudged and decreed, by the Court that the said John Olaf Johannessen be, and is hereby admitted and declared a citizen of the United States of America."

III.

That thereafter a Certified copy of said Order was issued out of said Superior Court and delivered to said John Oluf Johannessen.

IV.

That said Respondent was born in Norway, on October 11,
16 1869, and emigrated to the United States in the year 1888, arriving therein in the month of December, 1888, and never resided in the United States prior to said month of December, 1888. That said Respondent did not reside within the United States for the term of five years next preceding his said admission to citizenship on the said 6th day of October, 1892,—contrary to the provisions of Section 2170, Revised Statutes of the United States.

V.

That the discovery of the foregoing facts, to-wit, the discovery of the time of emigration of said Respondent, to the United States and of the time of the commencement of his residence therein, and the discovery of the fact that said Respondent did not reside within the United States for the term of five years preceding October 6, 1892, was not made by the Petitioner herein until within three years last past, to-wit, upon the 29th day of June, 1908, upon which last mentioned day the said discovery was made at San Francisco, California, through the voluntary statement of said Respondent to the United States Department of Justice.

VI.

That said John Oluf Johannessen now resides within the Northern District of the State of California.

VII.

That prior to the institution of this proceeding an affidavit showing good cause therefor was made by the said John Oluf Johannessen and delivered to the United States Attorney, in and for the said Northern District of California, a copy of which affidavit is attached, to the Original Petition on file herein, marked Exhibt "A," and made a part thereof, and hereby referred to and made a part hereof.

Wherefore your Petitioner prays that this Honorable Court,
17 after such notice to the said John Oluf Johannessen, as by law required, Decree that said Certificate was illegally procured and set aside, cancel and hold for naught the said Order and Certificate of Citizenship and take such other and further action in the premises as is meet in law or equity. And your petitioner will ever pray.

ROBERT T. DEVLIN,
CARLOS G. WHITE,
Attorneys for said Petitioner in and for the Northern District of California.

(Endorsed:) Filed Sep. 14, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

18 In the District Court of the United States for the Northern District of California.

No. 13848.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNESSEN, Respondent.

Stipulation as to Demurrer.

Stipulation that Demurrer to Petition Stand as Demurrer to Amended Petition.

It is hereby stipulated and agreed by and between the respective parties hereto, that the demurrer heretofore interposed by respondent to the petition in the above entitled matter may be considered and stand as the demurrer to the amended petition in said matter, and that in every place where said petition is referred to the said demurrer the same may be considered as referring to the amended petition.

Dated, October 29th, 1908.

ROBT T. DEVLIN.
United States Attorney,
Attorney for Petitioner.
PAGE, McCUTCHEN & KNIGHT,
Attorneys for Respondent.

(Endorsed:) Filed Jan. 8, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

19 In the District Court of the United States for the Northern District of California.

No. 13848.

THE UNITED STATES OF AMERICA
vs.
JOHN OLAF JOHANNESSEN.

Opinion Overruling Demurrer to Petition.

De Haven, District Judge:

This suit was instituted in behalf of the United States, to set aside a Judgment admitting the Defendant as a citizen of the United States, and to cancel the Certificate of Naturalization issued to the Defendant.

The Judgment sought to be annulled was entered in the Superior Court of Jefferson County, State of Washington, October 6, 1892. The specific ground upon which the United States demands the relief prayed for, is that Defendant did not reside within the United States for the term of five (5) years next preceding his admission to Citizenship. The Defendant has demurred to the Petition upon the grounds that the same does not state facts sufficient to enable the Petitioner to the relief prayed for.

I think the facts alleged in the Petition show that Defendants Certificate of Citizenship was illegally, if not, fraudulently procured, and

My conclusion is therefore, that a cause of action is stated in the Petition.

Demurrer overruled, and defendant will be allowed 20 days, within which to answer.

(Endorsed:) Filed Nov. 17, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

20 In the District Court of the United States for the Northern District of California.

No. 13848.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNESSEN, Respondent.

(*Decree of Cancellation.*)

Decree of Cancellation.

The said amended petition of the United States of America, heretofore duly filed in the above entitled proceeding, having come on

regularly for hearing before the above entitled Court, upon the Demurrer of said respondent to the said amended petition, the petitioner being represented at said hearing by Carlos G. White, Assistant United States Attorney, and the respondent by Messrs. Page, McCutchen & Knight, his attorneys; the said demurrer having been argued and submitted to the court for consideration and decision and the court having duly considered the same, and having been fully advised therein did, on November 17, 1909, overrule said demurrer with leave to said respondent to answer said amended petition within twenty (20) days, and the said respondent having failed to file an answer herein and his time to file said answer having expired,

It is hereby ordered that the default of said respondent for the failure to answer said amended petition is hereby entered, and it further appearing that by said respondent's failure to answer said amended petition, all the allegations in the said amended petition are taken as confessed, and that all the allegations of the said
21 amended petition are true, and that the order and certificate of citizenship made and entered in the Superior Court of Jefferson County, State of Washington, United States of America, on the 6th day of October, 1892, admitting John Olaf Johannessen to become a citizen of the United States was illegally procured as set forth in the amended petition on file herein, and it further appearing that this action was duly instituted by the United States District Attorney in and for this district, and that the said respondent was a resident of the said district at the time of the commencement of said action, and has had notice thereof in all respects required by law,

Now therefore, it is hereby ordered, adjudged and decreed that the said order and certificate of citizenship, admitting John Olaf Johannessen to become a citizen of the United States, and each and every certified copy thereof be and the same hereby is set aside, cancelled and held for naught.

It is hereby further ordered, adjudged and decreed that the said petitioner recover from said respondent the costs of this proceeding, taxed at $—, and it is further directed that a certified copy of this judgment and decree be sent to the Bureau of Immigration and Naturalization and that the clerk of this court transmit a copy of this judgment and decree also to the court out of which such certificate of citizenship was originally issued.

Dated January 8th, 1910.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed Jan. 8, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

22 In the District Court of the United States, Northern District of California.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNESSEN, Defendant.

(Petition for Appeal.)

The above named defendant, conceiving himself aggrieved by the decree made and entered on the 8th day of January, 1910, in the above entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, for the reason specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 11th day of January, 1910.

PAGE, McCUTCHEN & KNIGHT,
Attorneys for Defendant.

The foregoing claim of appeal is allowed.
Dated: January 11th, 1910.
JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed Jan. 11, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

23 In the District Court of the United States, Northern District of California.

UNITED STATES OF AMERICA, Petitioner,
vs.
JOHN OLAF JOHANNESSEN, Defendant.

Assignment of Errors.

The defendant prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

I.

That the court erred in overruling the demurrer to the amended petition.

II.

The court erred in holding and adjudging that a judgment of a court of competent jurisdiction could be impeached collaterally, for fraud intrinsic the record and occur-ing at the trial which resulted in such judgment.

III.

The court erred in holding and adjudging that it had by act of Congress of June 29th, 1906, Chapter 3592, Section 15, 34 Statutes at Large, 601, power to render its judgment cancelling and setting aside a certificate of naturalization theretofore obtained in form prescribed by law from a court of competent jurisdiction for fraud intrinsic the record.

24 IV.

The court erred in holding and adjudging that said certificate of naturalization could be cancelled under said act of Congress of June 29th, 1906, Chapter 3592, Section 15, 34 Statutes at Large, 601, and in not holding and adjudging that said act was in respect to said certificate ex post facto legislation under Section IX of Article I of the Constitution of the United States, and therefore void.

PAGE, McCUTCHEN & KNIGHT,
Attorneys for Defendant.

(Endorsed:) Filed Jan. 11, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

25 *(Bond on Appeal.)*

Know all men by these presents: That we John Oluf Johannessen, as principal, and J. E. Bolger and J. W. Curry, as sureties, are held and firmly bound unto United States of America in the full and just sum of three hundred dollars ($300.) to be paid to said United States of America, its attorneys or assigns; to which payment well and truly to be made we bind ourselves our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of January, 1910.

Whereas, lately at the District Court for the Northern District of California, in a suit depending in said Court between United States of America, as petitioner, and John Oluf Johannessen, defendant, a decree was rendered against the said John Oluf Johannessen, and the said John Oluf Johannessen, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit and a citation directed to the said United States of America citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 8th day of March next.

Now the condition of the above obligation is such that if the said John Oluf Johannessen shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his plea good
26 then the above obligation to be void, else to remain in full force and virtue.

JOHN OLAF JOHANNESEN. [SEAL.]
J. E. BOLGES. [SEAL.]
JOHN W. CURRY. [SEAL.]

Sealed and delivered in the presence of,

F. E. BOLAND.
THOMAS A. ALLAN.

Approved by

JOHN J. DE HAVEN,
Judge of the District Court of the United States, Northern District of California.

(Endorsed:) Filed Jan. 11, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

27 (*Citation.*)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United States of America. Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within sixty days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States in and for the Northern District of California, and filed in the clerk's office of said court on the 11th day of January, 1910, in a cause wherein John Oluf Johannessen is appellant and you appellee, to show cause, if any, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable John J. De Haven, Judge of the District Court of the United States in and for the Northern District of California this 11th day of January, 1910, and of the Independence of the United States the one hundred and thirty-fourth.

JOHN J. DE HAVEN,
District Judge.

Attest:

JAS. P. BROWN, *Clerk,*
By FRANCIS KRULL,
[SEAL.] *Deputy Clerk.*

28 Service of the within Citation and receipt of a copy is hereby admitted this 11th day of January, 1910.

ROB'T T. DEVLIN,
U. S. Attorney,
Attorney for Petitioner.

(Endorsed:) Filed Jan. 14, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

29 *Certificate of Clerk District Court as to Transcript.*

UNITED STATES OF AMERICA,
Northern District of California, ss:

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed Twenty-eight pages, numbered from 1 to 28 inclusive, contain a full and true Transcript of the records in the said District Court, made up pursuant to instructions, ("Præcipe for Apostles", embodied in the Transcript), of Messrs. Page, McCutchen and Knight, Proctors for Respondent and Appellant, in the case entitled The United States of America, Petitioner vs. John Oluf Johannessen, Respondent, No. 13,848.

I further certify that the cost of preparing and certifying the foregoing Transcript of Appeal, is the sum of Thirteen Dollars and Seventy cents ($13.70), and that the same has been paid to me by Proctors for Respondent and Appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of February A. D. 1910, and of the Independence of the United States the One Hundred and Thirty-fourth.

[Seal U. S. District Court, Northern Dist of California.]

JAS. P. BROWN, *Clerk.*

Endorsed on cover: File No. 22,062. N. California D. C. U. S. Term No. 230. John Oluf Johannessen, appellant, vs. The United States. Filed March 11th, 1910. File No. 22,062.

No. 230

In the Supreme Court
OF THE
United States

JOHN OLUF JOHANNESSEN,
Appellant,
vs.
THE UNITED STATES,
Appellee.

BRIEF ON BEHALF OF APPELLANT

EDWARD J. McCUTCHEN,
SAMUEL KNIGHT,
Solicitors for Appellant.

Filed this ..... *day of March, 1912.*

JAMES H. McKENNEY, Clerk.

By ..... *Deputy Clerk.*

BRAUNAU PUBLISHING CO., SAN FRANCISCO.

In the Supreme Court

OF THE

United States

JOHN OLUF JOHANNESSEN,
Appellant,

vs.

THE UNITED STATES,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

This is a proceeding instituted on behalf of the United States for the purpose of cancelling a certificate of citizenship, held by the appellant, upon the ground that the same was illegally or fraudulently procured.

Appellant is a native of Norway, and arrived in the United States for the first time in the month of December, 1888, never having been a resident of the United States prior to that time.

On the 6th day of October, 1902, the Superior Court of Jefferson County, State of Washington, in a proceeding in that behalf, made its judgment and decree admitting and declaring appellant to be a citizen of the United States. The witnesses in that proceeding, who

testified as to the length of residence of the appellant, gave false testimony in declaring that he had resided in the United States for at least five years.

On August 21, 1908, the United States District Attorney, for the Northern District of California, filed his petition, asking that the certificate issued in pursuance of such judgment be cancelled upon the ground that appellant had resided in the United States for less than the requisite period.

The appellant filed his answer, admitting the facts set forth, but, upon stipulation, such answer was withdrawn, and a demurrer filed.

An amended petition was thereupon filed, and, upon stipulation, the demurrer interposed to the first petition was made applicable thereto.

The demurrer was thereafter overruled, and upon failure of the appellant to answer, the court entered its decree cancelling the certificate.

Thereafter the appellant appealed to this court, and assigned as errors the following:

1. That the court erred in overruling the demurrer to the amended petition.

2. The court erred in holding and adjudging that a judgment of a court of competent jurisdiction could be impeached collaterally, for fraud intrinsic the record and occurring at the trial which resulted in such judgment.

3. The court erred in holding and adjudging that it had by act of Congress of June 29th, 1906, Chapter 3592, Section 15, 34 Statutes at Large, 601, power to render

its judgment cancelling and setting aside a certificate of naturalization theretofore obtained in form prescribed by law from a court of competent jurisdiction for fraud intrinsic the record.

4. The court erred in holding and adjudging that said certificate of naturalization could be cancelled under said act of Congress of June 29th 1906, Chapter 3592, Section 15, 34 Statutes at Large, 601, and in not holding and adjudging that said act was in respect to said certificate *ex post facto* legislation under Section IX of Article I of the Constitution of the United States, and therefore void."

Brief of the Argument.

Under the act of Congress regarding naturalization of aliens, as it was prior to the act of June 29, 1906 (34 Stats., 601), there was no procedure provided or express power given for an attack upon a certificate of naturalization. By that act (Sec. 15) it was provided that upon a proper showing to the United States District Attorney, of the proper district, he should institute suit

> "for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured."

It is here to be contended by appellant that that act is, as to him, void, and that the court erred in cancelling the certificate upon these broad grounds:

I.

A. A decree of naturalization is a judgment of a competent court and subject to all the rules of law regarding judgments as such.

B. A court of equity could not, prior to the act of June 29, 1906, set aside or annul a judgment for fraud intrinsic the record, i. e., founded upon a fraudulent instrument, perjured testimony, or any matter which was actually presented and considered in giving the judgment assailed.

C. If the act of June 29, 1906, gives such power, it is *ex post facto*.

II.

If the act of June 29, 1906, authorizes the impeachment of the judgment of a co-ordinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature.

III.

The act of June 29, 1906, does not apply in terms to certificates issued prior to its passage. The canon of construction being against retrospective operation, it will be construed not to apply to the present case.

Authorities.

A decree of naturalization is a judgment of a court, and, therefore, subject to all the rules of law regarding judgments as such.

Spratt v. Spratt, 4 Peters 393, 7 L. ed. 897;
2 Black, Judg., Sec. 804;

McCarthy v. Marsh, 5 N. Y. 263;
"The Acorn," Fed. Cas. No. 29;
Charles Green's Son v. Salas, 31 Fed. 106;
In re Bodek, 63 Fed. 813;
Pintsch Com. Co. v. Bergin, 84 Fed. 140;
Ex parte Knowles, 5 Cal. 300;
Tinn v. United States District Attorney, 148 Cal. 773;
Matter of Christern, 43 N. Y. Supp. Ct. 523; 11 Jones & Spencer 523;
Matter of Clark, 18 Barb. 444;
U. S. v. Gleeson, 78 Fed. 396; 90 Fed. 778.

A court of equity will not set aside a judgment on the ground that it is founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93;
Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929;
Steel v. St. Louis Smelting etc. Co., 106 U. S. 447; 27 L. E. 226;
Moffat v. United States, 112 U. S. 24, 28 L. Ed. 623;
Hilton v. Guyot, 42 Fed. 249, 252; 159 U. S. 113, 40 L. ed. 95;
United States v. Gleeson, 78 Fed. 396, 90 Fed. 778.

The Act of 1906, under which it is sought to cancel defendant's certificate of citizenship, operates as an *ex post facto* law, and is, therefore, within the prohibition

of Section IX of Article I of the Constitution of the United States.

Ex parte Garland, 71 U. S. 333, 18 L. ed. 366;
Cummings v. Missouri, 71 U. S. 277; 18 L. ed. 356;
Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506;
Commonwealth v. Edwards, 39 Ky., 9 Dana 447;
United States v. Starr, 27 Fed. Cas. No. 16,379;
Green v. Shumway, 39 N. Y. 418.

If the act of June 29, 1906, authorizes the impeachment of the judgment of a co-ordinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature.

Wieland v. Shillock, 24 Minn. 345;
Roche v. Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533;
Re Handley's Estate, 15 Utah 212, 49 Pac. 829, 62 Am. St. 926;
Cooley's Constitutional Limitations, 6th ed., 111;
1 Black on Judgments, 298;
Atkinson v. Dunlap, 50 Me. 111;
United States v. Aakervik, 180 Fed. 137;
Davis v. Menasha, 21 Wis. 497;
State v. Flint, 61 Minn. 539, 63 N. W. 113.

A statute should be construed to have a prospective operation only unless its terms show clearly a legislative intention that it should operate retrospectively.

Calder v. Bull, 3 Dall 386;
Cooley, Constitutional Limitations, 529;
8 Cyc., 1022;
28 Am. & Eng. Ency. Law, 693.

Argument.

A DECREE OF NATURALIZATION IS A JUDGMENT OF A COMPETENT COURT AND SUBJECT TO ALL THE RULES OF LAW REGARDING JUDGMENTS AS SUCH.

Whether such a decree was a judgment, and whether it was subject to collateral attack, was one of the issues, and was directly decided, in

Spratt v. Spratt, 4 Peters 393, 7 L. ed. 897.

Chief Justice Marshall, in delivering the opinion of the court, said:

> "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."

In

"*The Acorn*," Fed. Cas. No. 29,

which was a libel for the forfeiture of a ship for a violation of the registry laws, one of the issues was whether the owner was a citizen of the United States or not. An order of a court, admitting the owner to citizenship, was introduced. It was held:

> "The proceeding to obtain naturalization is clearly a judicial one. A hearing is required to be had in open court, and the right can be conferred only by the judgment of the court, and upon satisfactory proof. It, therefore, has all the elements of a judgment. That it has the character and attributes of a judgment, and is equally conclusive, the authorities are entirely uniform."

In

In re Bodek, 63 Fed. 813,

the court cites a letter from Mr. Evarts, then Secretary of State, which shows that the State Department so viewed the matter.

The State courts are of the same opinion,

Ex parte Knowles, 5 Cal. 300;

and in a recent case before the Supreme Court of California, the court said:

> "It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction."
>
> *Tinn v. United States District Attorney*, 148 Cal. 773.

THE JUDGMENT OF THE SUPERIOR COURT CANNOT BE SET ASIDE FOR PERJURED EVIDENCE ACTUALLY PRESENTED AND CONSIDERED IN REACHING SUCH JUDGMENT.

The decisions of this court upon the question of a right to attack a judgment given by a competent court of record are now in harmony, and lay down a uniform rule. The first and most important of the cases is that of the

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93.

In that case a bill in equity was filed to set aside a patent, issued upon confirmation of a Mexican grant. Mr. Justice Miller, in delivering the opinion of the court, after reviewing the authorities, states the rule

to be that a court of equity will set aside a judgment on the ground that it was procured

> "by some fraud practiced directly upon the party seeking relief against the judgment or decree,"

and whereby that party has been prevented from presenting all of his case to the court, but that

> "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

The reason given for the decision is:

> "That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

Chief Justice Waite, in

Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929,

affirmed the doctrine of the foregoing case, and extended it to the decisions of the Land Department, saying:

> "It has also been settled that the fraud, in respect to which relief will be granted in this class of cases, must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not

> enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

The case of

Hilton v. Guyot, 42 Fed. 249, 252; 159 U. S. 113; 40 L. ed. 95,

affirms the doctrine of the Throckmorton case, this court saying, at page 123:

> "It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before and passed upon by it."

It is believed that the case of

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870,

is not in conflict with the Throckmorton case. It was so held in the cases of

United States v. Gleeson, 78 Fed. 396, 90 Fed. 778,

and

Nelson v. Meehan, 155 Fed. 1.

The distinction between the Throckmorton case and *Holmes v. Marshall* does not seem to be carried out in that the series of cases, culminating in

United States v. Minor, 114 U. S. 233, 29 L. ed. 110,

which, it has been said, limit the doctrine of the Throckmorton case. In this latter case it was held that the

doctrine of the Throckmorton case did not apply in an action by the United States to set aside a patent, issued by the United States, on the ground of fraud in procuring the same. These cases do no more, however, than apply to conveyances of the government the same rules which apply to the conveyances of an individual.

Steele v. Smelting Co., 106 U. S. 447, 27 L. ed. 226;

Vance v. Burbank, 98 U. S. 61, 25 L. ed. 93;

Marquez v. Frisbie, 101 U. S. 472, 25 L. ed. 800;

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623;

Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 31 L. ed. 182;

United States v. San Jacinto Tin Co., 125 U. S. 273, 31 L. ed. 747.

IF IT BE SO, THAT UNDER THE LAW AS IT STOOD BEFORE THE ACT OF 1906 WAS PASSED THERE WAS NO RIGHT IN THE GOVERNMENT TO SET ASIDE A CERTIFICATE OF NATURALIZATION FOR SOME FRAUD WITHIN THE ISSUES, THEN AS TO THIS DEFENDANT, AND OTHERS IN LIKE SITUATION WITH HIM, THE ACT OF 1906 OPERATES AS AN EX POST FACTO LAW, AND IS THEREFORE WITHIN THE PROHIBITION OF THE CONSTITUTION OF THE UNITED STATES.

In that series of cases closely following the Civil War, called the "test oath" cases, the nature of *ex post facto* laws was fully determined and defined.

Ex parte Garland, 71 U. S. 333, 18 L. ed. 366;

Cummings v. Missouri, 71 U. S. 277, 18 L. ed. 356,

and in

Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506,

Mr. Justice Miller, speaking for the Supreme Court, said:

> "We are of opinion that any law passed after the commission of an offense which in the language of Washington, in *U. S. v. Hall,* 'In relation to that offense, or its consequences, alters the situation of a party to his disadvantage,' is an *ex post facto* law, and in the language of Denio, in *Hortung v. People,* 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.' "

It was held in

Commonwealth v. Edwards, 39 Ky., 9 Dana 447,

that although an act was a crime when committed if there were no proper procedure (as here) for its punishment (and in this case no jury was provided by the act), then a subsequent act providing proper procedure is, as to acts done before its passage, *ex post facto* and void.

In

United States v. Starr, 27 Fed. Cases No. 16,379,

it was held that, where a crime of murder was committed in the Indian country, of which no tribunal at the time of commission had jurisdiction, an act which afterward gave to a court jurisdiction, was, as to that offense, *ex post facto* and void.

The sanction provided in the "test oath" statutes considered by this court was the loss of some professional right. In

Green v. Shumway, 39 N. Y. 418,

the sanction for failing to take the oath was the loss of the electoral franchise, which was described by Judge Miller as being a

> "* * * severe penalty, which interferes with his privileges as a citizen; affects his respectability and standing in the community; degrades him in the estimation of his fellow men, and reduces him below the level of those who constitute the great body of the people of which the government is composed. It moreover inflicts a penalty, which, by the laws of this State, is a part of the punishment inflicted for a felony, and which follows conviction for such a crime. It is one of the peculiar characteristics of our free institutions, that every citizen is permitted to enjoy certain rights and privileges, which places him upon an equality with his neighbors. Any law, which takes away or abridges these rights, or suspends their exercise, is not only an infringement upon their enjoyment, but an actual punishment."

IF THE ACT OF JUNE 29, 1906, AUTHORIZES THE IMPEACHMENT OF THE JUDGMENT OF A COORDINATE COURT FOR FRAUD CONSISTING OF THE INTRODUCTION OF RELEVANT PERJURED TESTIMONY, IT IS UNCONSTITUTIONAL AS AN EXERCISE OF JUDICIAL POWER BY THE LEGISLATURE

In

Wieland v. Shillock, 24 Minn. 345,

the Supreme Court of Minnesota had before it an act which provided

> "that in all cases where judgment heretofore has been or hereafter may be obtained in any court of

> record, by means of perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment, at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice or representation."

The plaintiffs had attempted to bring themselves within the provisions of the act. The Supreme Court held the act to be unconstitutional, saying:

> "The language of this statute is so broad and comprehensive that the legislative intent to make it applicable to all judgments, whenever recovered, can hardly be doubted. But, as applied to a judgment like that attacked in the case at bar, we are of opinion that the act is unconstitutional. At the time of the passage of the act (February 20, 1877,) the defendant's judgment had, upon the facts alleged in the complaint in this action, become absolute, and not subject to be set aside, reversed or modified. He had, therefore, a fixed and vested right of property in it. If the act of 1877 is to be applied to this judgment, the effect is to change an absolute judgment to a judgment conditioned upon the result of the action which the act authorizes to be brought; and if the action thus authorized can be carried on, and the plaintiff succeed, the further effect will be that the judgment will be extinguished. Now, this is neither more nor less than to deprive the defendant of his property in the judgment without due process of law, in violation of section 7, art. 1, of our constitution."

The Supreme Court of Maine, in the case of

Atkinson v. Dunlap, 50 Me. 111,

disposed of a similar question in a similar way. The statute there provided that a petition for a review,

commenced within six months after the passage of the act, might be maintained notwithstanding that there might have been an unsuccessful petition for a review of the same action, when it was made to appear to the satisfaction of the court that a witness in the original trial testified falsely to a material fact, and that the petitioner was thereby taken by surprise and unable at the trial to produce evidence of the falsehood.

The court said (at page 115):

> "If the foregoing enactment was intended to be retrospective, it is not difficult to perceive that all judgments, rendered since the organization of the State, were by its provisions liable to be affected. Not because they might embrace an element of perjury but because of the principle involved in the Act. If a review of such judgments may be ordered for one cause, it may be equally so for another, or any cause within the discretion of the Legislature. Then the salutary maxim of the common law '*finis finem litibus imponit*' would become obsolete, when all cases heretofore settled by the most solemn adjudications known to the law, involving all rights and titles acquired under them, might pass in review before a subsequent tribunal, long after witnesses had deceased or their memories had become impaired."

The court then held the act to be prospective in its nature, and thus constitutional.

Judge Wolverton, sitting in the District Court for the District of Oregon, in

United States v. Aakervik, 180 Fed. 137,

applied the same principle to the act under discussion. After citing many authorities other than the two last mentioned, he says (page 147):

"Now, to come to the present case, prior to the recent act of Congress, the respondent's status as a naturalized citizen of the United States had, under the practice and rulings of the courts, become unalterably fixed and settled. The time had wholly elapsed in which the government could have applied in the same case for a rehearing or a new trial, and there was left no remedy by appeal so that the order admitting him to citizenship could be reviewed in that way. According to the adjudged cases, there was no equitable remedy left, the order being tantamount to a judgment, by which it might be vacated or annulled for fraud practiced upon the court by perjury or false swearing in procuring the order, nor for a revision of the court's action for error in passing upon the effect of the evidence. So that, but for the act in question, the government was wholly without a remedy for questioning the validity of respondent's citizenship. His status had become finally and effectually settled. It is only by prescribing a new and additional remedy that the government is enabled at all to attack this status, and this after the status had become judicially established. It seems clear that the effect of the legislation is to grant a new trial in a judicial proceeding which had otherwise become final and effective. That the result is destructive of a settled and most important and valuable right and privilege cannot be gainsaid."

A STATUTE SHOULD BE CONSTRUED TO HAVE A PROSPECTIVE OPERATION ONLY UNLESS ITS TERMS SHOW CLEARLY A LEGISLATIVE INTENTION THAT IT SHOULD OPERATE RETROSPECTIVELY.

The act of June 29, 1906, is an entire re-enactment of the law governing naturalization, and is, of course, intended to operate prospectively from its enactment.

Section 15, under which the court acted in cancelling the certificate issued to appellant, does not, in terms, differ from the balance of the act. It no where appears to have been the intention of Congress to give it a retrospective operation. There is no reason to believe that such was the intent.

Regarding such laws, Judge Cooley, in his work on Constitutional Limitations, page 529, says:

> "There is no doubt of the right of the Legislature to pass statutes which reach back and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the state constitution, and provided further that no other objection exists to them other than their retrospective character. *Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.*"

It is said in

8 Cyc., 1022,

that

> "Statutes not expressly made retrospective in terms are otherwise construed if possible; and where retrospective are construed as narrowly as possible."

And in

28 Am. & Eng. Ency. of Law, 693,

> "It may be laid down as a fundamental rule for the construction of statutes that they will be con-

sidered to have a prospective operation only, unless a legislative intent to the contrary is expressed or necessarily to be implied from the language used or the particular circumstances."

Respectfully submitted,

EDWARD J. MCCUTCHEN,

SAMUEL KNIGHT,

Solicitors for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

JOHN OLUF JOHANNESSEN, APPELLANT,
v.
THE UNITED STATES.
No. 230.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This was a petition by the Government in the United States District Court for the Northern District of California to cancel a certificate of naturalization held by appellant. The case was heard upon demurrer to the amended petition. (R., 7–9.)

The amended petition states, in substance, that on October 6, 1892, the Superior Court of Jefferson County, Washington, under and by virtue of section 2165 of the Revised Statutes, entered an order or certificate admitting Johannessen to citizenship. (R., 7.) This certificate, which is set out in the amended petition (R., 7–8), stated, among other things, that it had been made to appear to the satisfaction of the court

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by oaths of two named witnesses that Johannessen, a native of Norway, "has resided in the limits and under the jurisdiction of the United States five years at least last past."

The amended petition alleges that Johannessen did not arrive in the United States until December, 1888, and that he did not reside within the United States for the term of five years next preceding his admission to citizenship on the date of his naturalization, contrary to the provisions of section 2170 of the Revised Statutes of the United States (R., 8). It further alleges that these facts were not discovered by the Government until June 29, 1908, through the voluntary statement made by Johannessen to the United States Department of Justice. This statement of Johannessen was in the form of an affidavit, and is made a part of the amended petition (R., 9). In that affidavit (Exhibit A, R., 4) Johannessen said:

> I freely and voluntarily admit that I was illegally naturalized in 1892, as aforesaid, in that I had not been living in the United States for five years at that time, and in that I had only known my two witnesses, and my two witnesses had only known me, at that time, about two years and a half; and I freely and voluntarily make this affidavit for the purpose of having proceedings instituted under section 15 of the naturalization act of June 29, 1906, to set aside and cancel the certificate of citizenship issued to me, as aforesaid, on October 6, 1892, and I consent that this affidavit may be used against me in said proceedings and for all purposes.

The District Court held that "the facts alleged in the petition show that defendant's certificate of citizenship was illegally, if not fraudulently, procured" (R., 10). The demurrer was, therefore, overruled, and, upon the respondent failing to answer, a decree was entered canceling the certificate (R., 11). From that decree this appeal was taken.

Section 2165 of the Revised Statutes provided:

> SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:
>
> * * * * *
>
> Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, * * *; but the oath of the applicant shall in no case be allowed to prove his residence.

Section 2170 of the Revised Statutes provided:

> SEC. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

Section 15 of the naturalization act of June 29, 1906 (34 Stat., 596, 601), provides:

> SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such

certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

* * * * *

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

ARGUMENT.

I.

As the last paragraph of section 15 of the act of June 29, 1906, expressly provides that—

> The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws—

it is manifest that the only question presented for consideration upon this appeal is as to the power of Congress to authorize the cancellation of certificates of naturalization fraudulently or illegally procured. In contending that section 15 should not be given a retroactive effect, counsel for appellant appear to have overlooked this provision.

The Constitution, Article I, section 8, gives Congress power "to establish an uniform rule of naturalization." In pursuance of that authority, Congress declared (sec. 2165 of the Revised Statutes) that an alien might be admitted to citizenship "in the following manner, *and not otherwise*," one of the conditions prescribed by the same section being proof, other than by oath of the applicant, that he had resided within the United States at least five years. Sec-

tion 2170 further expressly provided that no alien should be admitted to become a citizen who had not for the continued term of five years next preceding his admission resided within the United States.

It is manifest from these provisions that the continuous residence of an alien within the United States for the requisite length of time was, under the old law, as under the act of June 29, 1906, a matter which went to the power of the court to act. If he could not meet this requirement, the court had no jurisdiction in the premises. The contention, therefore, that if, as in the present case, a court was induced to naturalize an alien by a misrepresentation of the facts as to his residence, Congress has no authority to authorize a judicial proceeding for the cancellation of his certificate of naturalization so obtained, is manifestly untenable. It amounts to saying that one could by fraud confer jurisdiction upon the courts to do that which Congress had expressly withheld from them, and which they had no power to do except by virtue of authority from Congress.

As said by the Circuit Court for the District of New Jersey in *United States* v. *Spohrer* (175 Fed., 440, 442):

> An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not

> of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant. Fraud can not be substituted for facts.

The contention as to lack of power in Congress to authorize the cancellation proceeding is rested upon the doctrine announced in *United States* v. *Throckmorton* (98 U. S., 61, 68), that—

> the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

It is contended that Congress has no greater power to authorize proceedings to cancel a judgment of naturalization than is possessed by a court of equity with respect to ordinary judgments or decrees. But even under this assumption, the doctrine announced in the Throckmorton case is inapplicable, because, as this court later pointed out, that doctrine has reference only to proceedings *inter partes*, and has no application to *ex parte* proceed-

ings by which a grant is obtained from the Government.

> *Moffatt* v. *United States* (112 U. S., 24, 32).
> *United States* v. *Minor* (114 U. S., 233).
> *United States* v. *American Bell Telephone Co.* (128 U. S., 315).
> *Hilton* v. *Guyot* (159 U. S., 207).
> *United States* v. *American Bell Telephone Co.* (167 U. S., 224, 240).

In *United States* v. *Minor*, *supra*, which was a suit to cancel a patent to land procured by fraud, this court carefully reviewed the Throckmorton case. It pointed out that while the relief sought in that case was to set aside a patent to land issued by the United States, the patent was issued as the confirmation of a Mexican grant after proceedings prescribed by act of Congress which were judicial in their nature, there being pleadings and parties and both parties being represented by counsel, with right of appeal to the courts (114 U. S., 241–242). The court quoted from the opinion in the Throckmorton case to the effect that the genuineness and validity of a certain concession produced by the complainant "was the single question pending before the board of commissioners and the District Court for four years"—that that "was the thing, and the only thing, that was controverted, and it was essential to the decree," and said (114 U. S., 242):

> It needs no other remarks than those we have already made, as to the nature of the proceeding before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was

> in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue a patent. They had no means of controverting its truth, and the Government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the solemn judgments of courts, with full jurisdiction over the parties, and the subject matter, made after appearance, pleadings and contests by parties on both sides, can not be properly applied to the proceedings in the land office in such cases.

The court in the Minor case also distinguished the case of *Vance* v. *Burbank* (101 U. S., 514), saying that "that was not a case by the grantor, the United States, to set aside the patent, but by a party, or the heirs of a party, who had contested the right of the grantee before all the officers of the Land Department up to the Secretary of the Interior, and been defeated, and where the whole question depended on disputed facts, the evidence of which was submitted by the contestants to those officers." In that connection the court said (114 U. S., 243):

> But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it can not be assailed

> by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value.

It is manifest that a naturalization proceeding (at least prior to the act of June 29, 1906, section 11, which gives the Government the right to be heard therein) was entirely *ex parte*. There was no contest by the Government, and no adversary proceedings. It was therefore similar in all substantial respects to an application to the Government for a patent for land.

In *United States* v. *Spohrer*, above cited, where the same issue was presented as in the present case, and in which the constitutionality of the provision of the act of June 29, 1906, authorizing the cancellation of certificates of naturalization fraudulently or illegally procured was upheld, the Circuit Court for the District of New Jersey carefully reviewed the Throckmorton case, and referred to the distinction which this court had made in the later cases between *ex parte* proceedings and proceedings *inter partes* (175 Fed., 440).

In 1869 Mr. Justice Field, sitting on the circuit, in the case of *In re McCoppin* (5 Saw., 630, 632), said:

> Undoubtedly, the court might, in a proper case, set aside its judgment admitting a party to citizenship, if the party was not at the time entitled to admission, and the court had reason to believe that it had been intentionally deceived.

In *United States* v. *Norsch* (42 Fed., 417, Circuit Court, Eastern District of Missouri) the power of the Federal courts to cancel a certificate of naturalization obtained by fraud in a State court was sustained, the court saying:

> The right of the United States to sue for the cancellation of a certificate or decree of naturalization that has been obtained by fraud is probably coextensive with the right now accorded the United States to sue for the cancellation of patents that have been fraudulently procured.

Any question as to the power of the courts, without express legislative authority, to set aside a decree of naturalization for fraud is of course removed by section 15 of the act of June 29, 1906. That act, however, does no more than to recognize the existing equity jurisdiction of the courts, and to specify the executive officer of the Government who shall put the judicial machinery in motion, *i. e.* the United States district attorney, upon receipt of an affidavit showing good cause to believe that a certificate of naturalization was fraudulently or illegally procured.

In addition to the case of *United States* v. *Spohrer*, above cited, the constitutionality of the act of June 29, 1906, and the jurisdiction of the United States courts thereunder to cancel a certificate of naturalization, whether issued by a State or Federal court, where it appears that the certificate has been procured without compliance with the requirement of

the law as to residence in the United States, has has been sustained in the following cases:

United States v. *Nisbit* (168 Fed., 1005), District Court, Western District of Washington.
United States v. *Mansour* (170 Fed., 671), District Court, Southern District of New York.
United States v. *Simon* (170 Fed., 680), Circuit Court, District of Massachusetts.
United States v. *Meyer* (170 Fed., 983), District Court, Eastern District of Washington.
United States v. *Luria* (184 Fed., 643), District Court, Southern District of New York.

II.

Appellant must rest entirely upon *United States* v. *Gleason* (78 Fed., 396), decided by the Circuit Court for the Eastern District of New York, and affirmed by the Circuit Court of Appeals for the Second Circuit in 90 Fed., 778, Judge Wallace dissenting.

In support of its conclusion in that case that a Federal court could not set aside a certificate of naturalization issued by a State court, the Circuit Court cited the cases of *Campbell* v. *Gordon* (6 Cranch, 176), and *Spratt* v. *Spratt* (4 Pet., 392), as to the conclusiveness of a judgment of naturalization. It will be observed that in those cases this court merely held that a judgment of naturalization could not be collaterally attacked. Here, the issue is whether the Government, which made the grant, can authorize a direct proceeding for the purpose of having it set aside for fraud.

The Circuit Court of Appeals, in the Gleason case, based its decision upon the ruling of this

court in the Throckmorton case. Referring to this view of the Circuit Court of Appeals in the Gleason case, Moore, in his International Law Digest (Vol. III, p. 500), says:

> But it may be doubted whether the rule, as laid down in *United States* v. *Throckmorton*, as to the determination of litigated issues by a judgment *inter partes*, is applicable to the so-called judgment in a naturalization proceeding. The principle of *res judicata* appears to be theoretically inapplicable to a decree of naturalization, which is in no wise a judgment terminating a preexisting controversy, but which is, on the contrary, the basis of constant and repeated future claims on the part of the beneficiary to the rights and privileges of citizenship and the protective action of the Government.

In *Pintsch Compressing Co.* v. *Bergin* (84 Fed., 140, 142) the Circuit Court for the District of Massachusetts, while holding that proceedings in a court of record under the naturalization laws were judicial and result in a judgment which can be impeached only as other judicial judgments are impeached, recognized the right of the United States, or one acting under its authority, to institute proceedings to annul such a judgment. The court said:

> The record thus ordered on the application of the respondent evidenced a solemn judicial judgment that she was entitled to receive, and did thereby receive, from the United

> States the franchise of citizenship. Is any one entitled to proceed for its rescission unless the United States themselves, or by their authorization? No precedent, no text writer, and no rule of law is cited which justifies us in answering this question affirmatively. The fundamental principle that, in the absence of a statute of authorization, only the United States can proceed judicially to recall or rescind franchises granted by them has peculiar force with reference to citizenship, as to which so great a variety of interests, political and individual, of high importance is concerned that the jurisdiction of inquiry should be especially fixed and limited. Even when proceeding diplomatically, and in their relations with foreign powers, the United States reserve to themselves the exclusive right to question the naturalization proceedings of their local tribunals.

In *United States* v. *Dolla* (177 Fed., 101) the Circuit Court of Appeals for the Fifth Circuit held that a naturalization proceeding under the act of June 29, 1906, was not a "case" within the meaning of section 6 of the judiciary act of March 3, 1891 (26 Stat., 828), regulating the appellate jurisdiction of that court, and therefore the judgment of a district court was final. This conclusion was reached notwithstanding the fact that under the act of 1906 the United States has the right to be heard. In the course of its opinion the Circuit Court of Appeals said:

> Naturalization has always been an act or judgment of a court, but never until the act of

> 1906 has it been suggested that the special proceedings authorized constituted a case, action, or cause that could be reviewed on writ of error under any judiciary act, State or Federal.

The decision in the Dolla case was followed by the Circuit Court of Appeals for the third circuit in *United States* v. *Neugebauer*, not yet reported, and it may be said, *ex cathedra*, that the Department of Justice has acquiesced in the view that judgments in naturalization cases are not appealable.

In the Dolla case the Circuit Court of Appeals also said (177 Fed., 105):

> * * * Naturalization of aliens is an act of grace, not right, and it is not necessarily a business of the courts. It is lodged in the courts for convenience, and, at the pleasure of Congress, can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with supervision of the operations under the act, or with any executive officer, as is now lodged the right and power to determine whether certain aliens shall be permitted to come into the country at all. (See *Lee Lung* v. *Patterson*, 186 U. S., 168; 22 Sup. Ct., 795; 46 L. Ed., 1108.) If naturalization is a judicial act it is because done by judges.

The view that naturalization is a judicial act because it is done by judges, rather than because of the nature of the act, is apparent when the nature of the act is analyzed, and is confirmed by the fact that in most countries is performed by administrative

officers. In England naturalization is conferred upon application to one of the principal secretaries of state; in France, by the President of the Republic; in Russia, by the minister of the interior; in Prussia, by the police authorities; in Norway, by the Storthing; in Turkey, by the minister of foreign affairs; and by the chief executive authority in all other European countries. (Report to the President of the Commission on Naturalization, H. Doc. No. 46, 59th Cong., 1st sess., p. 18.)

Naturalization under our Constitution is in all substantial respects like a patent for land or for an invention—an act of grace on the part of the Government, conditioned upon compliance with certain express requirements. In neither the one case nor the other can fraud or misrepresentation as to the existence of the requisite conditions give the grantee an indefeasible right to the grant as against the Government.

It has been held to be within the power of Congress, in respect to the Indian tribes, to authorize judgments of citizenship rendered by Territorial courts to be set aside and the matter inquired into *de novo*. (*Wallace* v. *Adams*, 204 U. S., 415.) It is not perceived why the power of Congress with respect to the naturalization of aliens under the Constitution is not as plenary.

III.

The contention that section 15 of the act of June 29, 1906, is an *ex post facto* law hardly merits serious consideration. It is not a law imposing punishment

upon an alien who has procured his naturalization by fraud or illegality. It merely provides a method by which he may be deprived of the rights and privileges which he has acquired by such fraud or illegality. As well say that an act of Congress authorizing the Government to institute suit to set aside a patent for land acquired from it by fraud is an *ex post facto* law.

The decree of the District Court should therefore be affirmed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

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JOHANNESSEN *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 230. Submitted April 22, 1912.—Decided May 27, 1912.

Prior decisions of this court holding that a judgment of a competent court admitting a person to citizenship is, like every other judgment, competent evidence of its own validity, go no further than protecting the judgment from collateral attack.

Congress may authorize direct proceedings to attack certificates of citizenship on the ground of fraud and illegality; and § 15 of the act of June 29, 1906, 34 Stat. 596, 601, c. 3592, providing for such cases, is a valid exercise of the power of Congress under Art. I, § 8 of the Constitution of the United States.

The foundation of the doctrine of *res judicata* or estoppel by judgment is that both parties have had their day in court, *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48; and where a certificate of naturalization was issued without the Government appearing there is no estoppel against it, nor is such a certificate conclusive against the public.

Certificates of naturalization, like patents for land or inventions, when issued *ex parte* can be annulled for fraud.

How the judicial review of a certificate of naturalization should be conducted rests in legislative discretion.

Quære as to the conclusive effect of a certificate of naturalization issued after appearance and cross-examination by the Government.

Quære: Whether, in the absence of statute such as the act of June 29, 1906, a court of equity could set aside, or restrain the use of, a certificate of naturalization.

The act of June 29, 1906 is not unconstitutional as an exercise of judicial power by the legislative branch of the Government, nor is it unconstitutional because retrospective.

The *ex post facto* provision of the Constitution is confined to laws affecting punishment for crime and has no relation to retrospective legislation of any other description.

An alien has no legal or moral right to retain citizenship obtained solely by fraud, and an act permitting the cancellation of a certificate so obtained is not a punishment but simply nullifies that which the party had no right to.

THE facts, which involve the power of the court under the act of June 29, 1906, c. 3592, to cancel a certificate of naturalization on the ground that it was fraudulently issued, are stated in the opinion.

Mr. Edward J. McCutchen and *Mr. Samuel Knight* for appellant:

A decree of naturalization is a judgment of a court, and, therefore, subject to all the rules of law regarding judgments as such. *Spratt* v. *Spratt*, 4 Pet. 393; 2 Black, Judg., § 804; *McCarthy* v. *Marsh*, 5 N. Y. 263; *The Acorn*, Fed. Cas. No. 29; *Charles Green's Son* v. *Salas*, 31 Fed. Rep. 106; *In re Bodek*, 63 Fed. Rep. 813; *Pintsch Com. Co.* v. *Bergin*, 84 Fed. Rep. 140; *Ex parte Knowles*, 5 California, 300; *Tinn* v. *United States Dist. Atty.*, 148 California, 773; *Matter of Christern*, 43 N. Y. Sup. Ct. 523; *S. C.*, 11 Jones & Spencer, 523; *Matter of Clark*, 18 Barb. 444; *United States* v. *Gleason*, 78 Fed. Rep. 396; 90 Fed. Rep. 778.

A court of equity will not set aside a judgment on the ground that it is founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. *United States* v. *Throckmorton*, 98 U. S. 61; *Vance* v. *Burbank*, 101 U. S. 514; *Steel* v. *St. Louis Smelting &c. Co.*, 106 U. S. 447; *Moffat* v. *United States*, 112 U. S. 24; *Hilton* v. *Guyot*, 42 Fed. Rep. 249, 252; *S. C.*, 159 U. S. 113;

United States v. *Gleason*, 78 Fed. Rep. 396; *S. C.*, 90 Fed. Rep. 778.

The act of 1906, under which it is sought to cancel defendant's certificate of citizenship, operates as an *ex post facto* law, and is, therefore, within the prohibition of § 9 of Art. I of the Constitution of the United States. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*, 107 U. S. 221; *Commonwealth* v. *Edwards*, 39 Kentucky (9 Dana), 447; *United States* v. *Starr*, 27 Fed. Cas. No. 16,379; *Green* v. *Shumway*, 39 N. Y. 418.

If the act of June 29, 1906, authorizes the impeachment of the judgment of a coördinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature. *Wieland* v. *Shillock*, 24 Minnesota, 345; *Roche* v. *Waters*, 72 Maryland, 264; *Re Handley's Estate*, 15 Utah, 212; Cooley's Const. Lim., 6th ed., 111; 1 Black on Judgments, 298; *Atkinson* v. *Dunlap*, 50 Maine, 111; *United States* v. *Aakervik*, 180 Fed. Rep. 137; *Davis* v. *Menasha*, 21 Wisconsin, 497; *State* v. *Flint*, 61 Minnesota, 539; 63 N. W. Rep. 113.

A statute should be construed to have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. *Calder* v. *Bull*, 3 Dall. 386; Cooley's Const. Lim. 529; 8 Cyc. 1022; 28 Am. & Eng. Ency. Law, 693.

Mr. Assistant Attorney General Harr for the United States:

The last paragraph of § 15 of the act of June 29, 1906, expressly applies not only to certificates of citizenship issued under the provisions of that act, but to all certificates theretofore issued by any court under prior laws.

Under §§ 2165, 2170, Rev. Stat., the continuous residence of an alien within the United States for the requisite

length of time was, under the old law, as under the act of June 29, 1906, a matter which went to the power of the court to act. If he could not meet this requirement, the court had no jurisdiction in the premises. The contention, therefore (based on *United States* v. *Throckmorton*, 98 U. S. 61), that if, as in the present case, a court was induced to naturalize an alien by a misrepresentation of the facts as to his residence, Congress has no authority to authorize a judicial proceeding for the cancellation of his certificate of naturalization so obtained, is manifestly untenable. It amounts to saying that one could by fraud confer jurisdiction upon the courts to do that which Congress had expressly withheld from them, and which they had no power to do except by virtue of authority from Congress. *United States* v. *Throckmorton*, 98 U. S. 61, 68.

But even if Congress has no greater power to authorize proceedings to cancel a judgment of naturalization than is possessed by a court of equity with respect to ordinary judgments or decrees the *Throckmorton Case* is inapplicable, because that case has reference only to proceedings *inter partes*, and has no application to *ex parte* proceedings by which a grant is obtained from the Government. *Moffatt* v. *United States*, 112 U. S. 24, 32; *United States* v. *Minor*, 114 U. S. 233; *United States* v. *Am. Bell Telephone Co.*, 128 U. S. 315; *Hilton* v. *Guyot*, 159 U. S. 207; *United States* v. *Am. Bell Telephone Co.*, 167 U. S. 224, 240.

A naturalization proceeding (at least prior to the act of June 29, 1906, § 11, which gives the Government the right to be heard therein) was entirely *ex parte*. There was no contest by the Government, and no adversary proceedings. It was therefore similar in all substantial respects to an application to the Government for a patent for land.

Prior to the act of June 29, 1906, the power of the Federal court to cancel a certificate of naturalization obtained by fraud was recognized. *In re McCoppin*, 5

Saw. 630, 632; *United States* v. *Norsch*, 42 Fed. Rep. 417.

The constitutionality of the act of June 29, 1906, and the jurisdiction of the United States courts thereunder to cancel a certificate of naturalization, whether issued by a state or Federal court, where it appears that the certificate has been procured without compliance with the requirement of the law as to residence in the United States, has been sustained in the following cases: *United States* v. *Nisbet*, 168 Fed. Rep. 1005; *United States* v. *Mansour*, 170 Fed. Rep. 671; *United States* v. *Simon*, 170 Fed. Rep. 680; *United States* v. *Meyer*, 170 Fed. Rep. 983; *United States* v. *Spohrer*, 175 Fed. Rep. 440; *United States* v. *Luria*, 184 Fed. Rep. 643.

Appellant must rest entirely upon *United States* v. *Gleason*, 78 Fed. Rep. 396, affirmed, 90 Fed Rep. 778, Judge Wallace dissenting.

In *Campbell* v. *Gordon*, 6 Cranch, 176, and *Spratt* v. *Spratt*, 4 Pet. 392, on which that decision was based held merely that a judgment of naturalization could not be collaterally attacked. Here, the issue is whether the Government, which made the grant, can authorize a direct proceeding for the purpose of having it set aside for fraud. See 3 Moore, Int. Law Dig. 500.

The view that naturalization is a judicial act because it is done by judges (*United States* v. *Dolla*, 177 Fed. Rep. 101, 105), rather than because of the nature of the act, is apparent when the nature of the act is analyzed, and is confirmed by the fact that in most countries it is performed by administrative officers. In England naturalization is conferred upon application to one of the principal secretaries of state; in France, by the President of the Republic; in Russia, by the minister of the interior; in Prussia, by the police authorities; in Norway, by the Storthing; in Turkey, by the minister of foreign affairs; and by the chief executive authority in all other European

countries. (Report to the President of the Commission on Naturalization, H. Doc. No. 46, 59th Cong., 1st sess., p. 18.)

Naturalization under our Constitution is in all substantial respects like a patent for land or for an invention—an act of grace on the part of the Government, conditioned upon compliance with certain express requirements. In neither the one case not the other can fraud or misrepresentation as to the existence of the requisite conditions give the grantee an indefeasible right to the grant as against the Government. See *Wallace* v. *Adams*, 204 U. S. 415.

The contention that § 15 of the act of June 29, 1906, is an *ex post facto* law hardly merits serious consideration.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a proceeding under § 15 of the act of June 29, 1906, c. 3592, 34 Stat. 596, 601, instituted by the district attorney of the United States for the Northern District of California, to cancel a certificate of citizenship, granted to the appellant by a state court long prior to the passage of the act referred to, on the ground that it had been fraudulently and illegally procured. The case was heard upon demurrer to an amended petition, which demurrer was overruled; and thereupon, no answer being filed, the court proceeded to make a decree setting aside and canceling the certificate. The appellant brings that decree here for review.

The facts, as set forth in the amended petition and admitted by the demurrer, are as follows: Johannessen, the appellant, is a native of Norway, and arrived in the United States for the first time in the month of December, 1888. Less than four years thereafter, and on October 6, 1892, he applied to the Superior Court of Jefferson County, in the State of Washington, under § 2165 of the Revised Statutes of the United States, to be admitted to

citizenship, and procured from that court a certificate admitting him to such citizenship. This certificate was based upon the perjured testimony of two witnesses, to the effect that Johannessen had resided within the limits and under the jurisdiction of the United States for five years at least then last past. The facts were not discovered by the Government until June 29, 1908, when Johannessen made a voluntary statement to the Department of Justice in the form of an affidavit, which is made a part of the amended petition, and wherein he admits that the certificate of citizenship was illegally procured, in that he had not been a resident of the United States for five years at the time it was issued.

The petition contains all necessary averments to show the jurisdiction of the District Court over the present action, leaving only the merits in controversy.

The provisions of law in force at the time Johannessen thus applied for and procured admission to citizenship are contained in §§ 2165 and 2170 of the Revised Statutes, which, so far as pertinent, are as follows:

"SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.

"Second. He shall, at the time of his application to be admitted, declare, on oath, before some one of the

courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

"Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of a good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence."

* * * * * * * *

"SEC. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States."

The act of June 29, 1906, contains a revision of the naturalization laws, together with some additional provisions, among which are the following:

"SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of

citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

* * * * * * * *

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

"The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."

The principal contentions in the argument for appellant are, that a decree of naturalization is a judgment of a competent court and subject to all the rules of law regarding judgments as such; that a court of equity could not, prior to June 29, 1906, set aside or annul such a judgment

for fraud intrinsic the record, that is, founded upon perjured testimony, or any matter which was actually presented and considered in giving the judgment; and that if the act of June 29, 1906, authorizes the impeachment of the preëxisting judgment of a coördinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature.

It was long ago held in this court, in a case arising upon the early acts of Congress which submitted to courts of record the right of aliens to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. *Spratt* v. *Spratt*, 4 Pet. 393, 408. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. See also *Campbell* v. *Gordon*, 6 Cranch, 176.

It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by § 15 of the act of 1906. Appellant's contention involves the notion that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible. This question may be first disposed of.

The Constitution, Art. I, § 8, gives to Congress power "to establish an uniform Rule of Naturalization." Pursuant to this authority it was enacted, as above quoted from the Revised Statutes, that an alien might be admitted to citizenship "in the following manner and not otherwise"; § 2165 requiring proof of residence within the United States for five years at least; and § 2170 declaring a continued term of five years' residence next preceding his admission to be essential. An examination of this legislation makes it plain that while a proceeding

for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the Government a party nor to give any notice to its representatives.

The act of June 29, 1906, in § 11 (34 Stat. 599), declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood. For present purposes we assume, however, that the Government had such an interest as entitled it, even without express enactment, to raise an issue upon an alien's application for admission to the privileges of citizenship. What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us. (See 2 Black, Judgts., § 534, a.) What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the Government and without opportunity, to say nothing of duty, on the part of the Government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great numbers of aliens thus

applying at irregular times in the various courts of record of the several States and in the Federal Circuit and District Courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the Government of the United States or to the public, it is of course impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone.

The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgts., §§ 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48:

"That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public. Such a certificate, including the "judgment" upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land (Rev. Stat., § 2289, etc.), or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.).

Judicial review of letters patent, looking to their cancellation when issued unlawfully or through mistake or when procured by fraud, is very ancient—possibly antedating the establishment of the court of equity in England.

3 Black. Com. 47, 48. As pointed out by Mr. Justice Grier, speaking for this court in *United States* v. *Stone*, 2 Wall. 525, 535; the original mode was by writ of *scire facias*, the bill in equity being afterwards adopted as a more convenient remedy. In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 281; previous cases were reviewed and the practice discussed. In *United States* v. *Beebe*, 127 U. S. 338, 342; Mr. Justice Lamar, speaking for this court, said: "It may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked." See also *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 175, and cases cited.

United States v. *Throckmorton*, 98 U. S. 61, is not opposed in principle, for, as pointed out in *United States* v. *Minor*, 114 U. S. 233, 241, the patent was issued on the confirmation of a Mexican grant after judicial proceedings, where there were pleadings and parties, and witnesses were examined on both sides, with the right to appeal. *Vance* v. *Burbank*, 101 U. S. 514, 519, was likewise a contested case in the Land Department, as the report shows.

The doctrine that a patent issued *ex parte* may be annulled for fraud has been repeatedly applied to patents for inventions. *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 361; *Same* v. *Same*, 167 U. S. 224, 238.

Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. Section 15 of the act of June 29, 1906 (34 Stat. 601), provides for a proceeding in a "court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," upon fair

notice to the party holding the certificate of citizenship that is under attack. No criticism is made of this mode of procedure.

The views above expressed render it unnecessary for us to go into the question whether on general principles and without express legislative authority, a court of equity, at the instance of the Government, might set aside a certificate of citizenship or restrain its use, for fraud or the like. In *United States* v. *Norsch*, 42 Fed. Rep. 417, it was declared that the Government could sue in a Federal court for the cancellation of a certificate that had been procured by fraud in a state court, but it was held that the facts set forth in the bill did not make out a sufficient case of fraud. In *United States* v. *Gleason*, 78 Fed. Rep. 396, 90 Fed. Rep. 778, the contrary conclusion was reached upon the main question. These two cases arose prior to the act of 1906.

Since the passage of that act, the district courts have quite generally sustained the action for a cancellation of fraudulent certificates. *United States* v. *Nisbet*, 168 Fed. Rep. 1005; *United States* v. *Simon*, 170 Fed. Rep. 680; *United States* v. *Mansour*, 170 Fed. Rep. 671; *United States* v. *Meyer*, 170 Fed. Rep. 983; *United States* v. *Luria*, 184 Fed. Rep. 643; *United States* v. *Spohrer*, 175 Fed. Rep. 440. In the latter case Judge Cross used the following pertinent language (at p. 442): "An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not

he takes nothing by his paper grant. Fraud cannot be substituted for facts." And again, at p. 446: "That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and, if that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner."

The contention that the act of June 29, 1906, in authorizing the impeachment of certificates of naturalization theretofore issued for fraud consisting of the introduction of perjured testimony, is unconstitutional as an exercise of judicial power by the legislative department, is in effect disposed of by what has been said. The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers. *Sampeyreac* v. *United States*, 7 Pet. 222, 239; *Freeborn* v. *Smith*, 2 Wall. 160, 175; *Garrison* v. *New York*, 21 Wall. 196, 202; *Freeland* v. *Williams*, 131 U. S. 405, 413; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478.

An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued. As was well said by

Chief Justice Parker in *Foster* v. *Essex Bank*, 16 Massachusetts, 245, 273, "there is no such thing as a vested right to do wrong."

The remaining points taken by the appellant may be briefly disposed of. One is that the provisions of § 15 of the act of 1906 are not retrospective. This is refuted by a reading of the closing paragraph of the section. Finally it is insisted that, if retrospective in form, the section is void, as an *ex post facto* law within the prohibition of Art. I, § 9 of the Constitution. It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. Cooley's Const. Lim. (6th ed.), 319; *Calder* v. *Bull*, 3 Dall. 386, 390; and Rose's Note thereon. The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an *ex post facto* law. *Cummings* v. *Missouri*, 4 Wall. 277, 321; *Ex parte Garland*, 4 Wall. 333, 378. But the act under consideration inflicts no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never right-

fully his. Such a statute is not to be deemed an *ex post facto* law.

The decree under review should be

Affirmed.